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**From:**

**Sent:** Wednesday, December 07, 2011 2:13:15 PM

**To:**

**Cc:**

**Subject:** RE: Form 870-AD and Claims for Refund

We understand that the taxpayer and the Service executed a Form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, for several tax years in which the taxpayer reserved the right to file claims for refunds for specific items listed on the Form 870-AD.

The Service has now requested advice as to whether it has the authority to ask for additional information from the taxpayer through Information Document Requests (IDRs) with respect to those previously examined years in order to consider the taxpayer's refund claims. The information, although not related to the specific issues reserved by the taxpayer in connection with the refund claims, is necessary in order to determine whether there is an overpayment, and if so, the correct amount.

We have considered the issue and concluded that when a taxpayer has filed refund claims with respect to years previously closed by the Service under a Form 870-AD, the Service is not reopening the case when it reexamines those years in order to consider those refund claims. The Service must examine the entire tax year in order to determine the taxpayer's proper tax liability and whether or not an overpayment exists. Accordingly, the Service has the authority to issue the IDRs to the taxpayer with respect to the previously audited years in order to examine and determine the taxpayer's refund claims.

Form 870-AD and Reopening a Case

The Form 870-AD prohibits the Service from reopening a case unless there was fraud, malfeasance, concealment, or misrepresentation of a material fact; an important mistake in a mathematical calculation; a deficiency or overassessment resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level; or an excessive tentative allowance of a carryback provided by law.

In deciding whether the Service may reexamine issues previously considered in a Form 870-AD, we must first determine what is considered reopening a case. In Rev. Proc. 2005-32, 2005-1 C.B. 1206, the Service determined that the reopening of a closed case generally involves an examination of a taxpayer's liability that may result in an adjustment to liability unfavorable to the taxpayer for the same taxable period as the closed case. There are exceptions to this rule, however. Specifically, the revenue procedure provides that the Service's review, including an inspection of books of account, of a taxpayer's claim for a refund on an amended excise or income tax return, as well as the Service's review of a Form 843, Claim for Refund and Request for Abatement, claiming a refund for an overpayment reported on a return, is an exception to the general rule and not a reopening of a closed case.

#### Determining an Overpayment

When a taxpayer files a claim for refund, before the Service can determine whether an overpayment exists, the Service must first examine the entire tax year to determine the taxpayer's proper tax liability. In Lewis v. Reynolds, 284 U.S. 281 (1932), the Supreme Court upheld the Commissioner's denial of a claim for refund when, upon re-examination of a previously audited return, the Commissioner determined a previously allowed deduction for attorney's fees was improper and there was an additional tax due greater than the tax paid. The Court concluded that the Commissioner's actions were proper, and that "the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability." See Lewis v. Reynolds, 284 U.S. at 283. "While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied." Id.

Accordingly, for any year in which a taxpayer has filed a claim for refund, the Service is authorized to request any information it deems necessary from the taxpayer in order to determine the correct amount of tax for the year and the amount, if any, of any overpayment.